SUPREME COURT

OF THE

UNITED STATES.

No. 164. DECEMBER T. 1866.

THE MILWAUKEE & MINNESOTA RAILROAD COMPANY,
Appellant,

vs.

JAMES P. SOUTTER, Survivor,
Complainant and Appellee.

This suit was commenced in 1859, to foreclose a morgage given to the complainant, upon which one semi-annual installment of interest had become due and remained unpaid. The validity of the mortgage was contested in the Court below, and a decree was there rendered declaring the mortgage, and the bonds thereby secured, good for fifty cents on the dollar of their nominal amount.

From this decree the complainant appealed to this Court; and on hearing in February, 1864, this Court reversed the decree below, and decreed the mortgage and bonds good for their nominal amount. The cause was remanded to the Circuit Court, with directions "*to enter a "decree for all the interest due, and secured by the mortgage with costs;*" and to ascertain the balance or amount due over money in the hands of the Receiver or *Receivers*; and make an order *that unless such balance should be paid within one year thereafter, that the mortgaged premises should be sold.* The mandate contained the following provision:

" And further that in case the interest on the bonds is paid without " a sale, *the decree shall remain as security* for subsequent accruing in- " terest, and ultimately for the principal."

Under this mandate the Circuit Court made an order on the 27th Sept. 1864, ascertaining the amount due to be $405,290.05 and directing a sale unless that same should be paid within one year. This order contained the following: "And it is further ordered, &c., that after the " expiration of the said year, the complainant shall be at liberty when " further installments of interest shall be due and remain unpaid, or " when the said principal sum shall become due and remain unpaid, to " apply for an order for the sale of the said mortgaged premises, as " directed by and in accordance with the mandate of the Supreme " Court."

In the meantime the Milwaukee and Minnesota Company—the owner of the Equity of Redemption—had offered to pay unto the Court below the whole amount of interest due and asked to have the Receiver dismissed and for possession of the premises, the Eastern Division of the railroad and the rolling stock pertaining thereto. This was denied upon division by the Court below; and the Minnesota Company appealed to this Court. This appeal was heard in March, 1865, and this Court sent a second mandate to the Court below among other things, as follows:

" And it is further ordered that this cause be, and the same is hereby " remanded to the said Circuit Court with instructions to ascertain the amount due to complainants within some reasonable time to be fixed by said Court, *and to make an order that, on the payment of that sum, with the costs* of complainants, into Court within said time, the receiver shall be discharged, and the railroad from Milwaukee to Portage City, *with all the appurtenances, rolling stock, and other property, real and personal, belonging to said division of road*, be delivered by said Receiver to the Milwaukee and Minnesota Railroad Company; but that no such discharge of the Receiver or delivery of the Road and its appurtenances shall be made until said company shall first enter into bond with sufficient surety to pay to Sebre Howard and Selah Chamberlain, all such sums as may come into the hands of said company, which shall hereafter be found to be rightfully applicable to the payment of their claims if they shall be established as liens on said road."

Under this mandate, the Circuit Court on the 18th July, 1865, made an order as follows:

"On motion of Matt H. Carpenter, Solicitor of the Milwaukee & Minnesota Railroad Company, one of the defendants in this case. And on the mandate of the Supreme Court of the United States in this cause: "Ordered that the whole amount due the complainants in this cause, and to become due before the day of sale of the mortgaged premises are estimated as now appeared to be as follows, viz: Amount fixed by order or decree *nisi*, $405,290.05, together with interest thereon since September 27, 1864. Coupons due March 1, 1865, $40,000, with interest thereon since that date. Coupons to become due September 1, 1865, $40,000, with interest thereon from that date. Expenses, counsel fee, etc., allowed at $35,796.33, with interest thereon from this day: Ordered further that in case said Milwaukee and Minnesota Railroad Company shall, before a sale of the mortgaged premises in this cause, pay to the clerk of this court for the complainant in this cause the several sums above mentioned with interest thereon as aforesaid to the day of such payment and the costs in this cause to be taxed, that upon such payment, the said Receiver, Hans Crocker, *and the said Milwaukee & Paul Railway Company, its officers, directors, agents and employees*, deliver over to said Milwaukee & Minnesota Railroad Company, the Eastern Division, so called, of the La Crosse & Milwaukee Railroad, so called from Milwaukee to Portage, *together with all the rolling stock that was on the whole of the La Crosse & Milwaukee Railroad, or belonged or appertained thereto when the said Receiver was appointed, except forty box cars numbered as follows, viz:* 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, 408, and also deliver to said Milwaukee & Minnesota Railroad Company such proportion of the rolling stock that was purchased by the Receiver as 121,178 dollars bears to 26,199 dollars, together with all the rights, privileges and franchises and personal and other property belonging or in any wise appertaining to said Railroad from Milwaukee to Portage, and that the said Receiver be thereafter dismissed and discharged except for the purpose of passing his accounts

"Ordered further, that before the Milwaukee & Minnesota Railroad Company shall be allowed and permitted to enter into possession as aforesaid, it shall make, execute and file with the Clerk of this Court, a bond to the United States in the penal sum of twenty-five thousand dollars with sufficient surely to pay to Sebre Howard and Selah Chamberlain, or the owners of said judgments, or either of them, all such sums as may come into the hands of said Company, which shall hereafter be found to be rightfully applicable to the payment of their claims, if they shall be established as liens upon said road. And that said Company execute its bond to Hans Crocker, in the sum of twenty thousand dollars, with sufficient surety to indemnify him for contingen t

liability mentioned in the report of the Auditor in this cause. Ordered further, that said Howard or Chamberlain may, at any time hereafter, apply to the Court for an additional bond if the circumstances of the case shall require it, both of said bonds hereinbefore mentioned to be approved by the Clerk of this Court. Ordered further, that if the said Milwaukee & St. Paul Railway Company shall pay over the sum in its bonds or any part thereof, as this day ordered, the said Milwaukee & Minnesota Railroad Company shall only be required to pay to the Clerk of this Court the balance of the amount so due said complainant at the date of payment by said last named company, over such sum so paid by said Milwaukee & St. Paul Railway Company, and said Milwaukee & Minnesota Railroad Company shall be entitled to possession as hereinbefore mentioned, upon payment of such balance, and giving bonds as hereinbefore ordered."

The said Eastern Division, and the rolling stock pertaining thereto, had been delivered by the Receiver to the St. Paul Company, by the District Court, June 13, 1863, and said Company had virtually thereby become a Receiver of the Court, and had given bond therefor as follows:

"Know all men by these presents, that the Milwaukee and St. Paul "Railway Company, as principal, and David M. Hughes, Alexander "Mitchell, Russell Sage, Fred. P. James, N. A. Cowdrey, Horace Gal- "pin, William H. White, George W. Rodgers, Selah Chamberlain, and "Asahel Finch, as sureties, are held and firmly bound unto the United "States of America, for the use and benefit of all interested herein, in "in the penal sum of one hundred thousand dollars, lawful money of "the United States of America, to be paid to the said obligee, its "assigns, or any party interested herein, to which payment well and "truly to be made to the said obligee, the said obligors bind themselves, "their heirs, executors, administrators, and assigns, firmly, by these "presents.

"Sealed with our seals, and dated this 12th day of June, in the year "one thousand eight hundred and sixty-three.

"The condition of this obligation is such, that whereas the District "Court of the United States for the District of Wisconsin, in a certain "case therein pending, wherein Greene C. Bronson, James T. Soutter "and Shepard Knapp are complainants, and the La Croose and Mil- "waukee Railroad Company and others are defendants, made a certain "order, bearing date on the 12th day of June, A. D. 1863, directing "the Receiver to let the said Milwaukee and St. Paul Railway Com- "pany into possession of the Eastern Division of the La Crosse and "Milwaukee Railroad, between Portage City and Milwaukee, with its "appurtenances, property, *and rolling stock belonging thereto*, and di- "recting said Milwaukee and St. Paul Railway Company, subject to

"the further order or orders of said District Court, to operate said "Eastern Division of said railroad in connection with the Western "Division thereof, from Portage City to La Crosse, so that one contin- "uous line of railroad between La Crosse and Milwaukee might be "operated and conducted as directed in the original charter of the "La Crosse and Milwaukee Railroad Company, without hindrance, "interruption, or diversion, the same as if the whole line of road con- "tinued to be in one company, in pursuance of said charter, and not "otherwise.

"And further directing that the said Milwaukee and St. Paul Rail- "way Company shall, at all times, allow and permit the Receiver, or "such other persons as may be at any time appointed for that purpose, "daily access and examination of the records, books, and papers, "accounts, proceedings, receipts, and revenues, and also of the trans- "actions of the said Milwaukee and St. Paul Railway Company and of "its board of directors in relation to the business and operations of the "whole line of road, and that the said railway company should, out of "the revenues of said road, keep the Eastern Division and all the "rolling stock in good order, and defray all running and other necessa- "ry expenses, and at the end of every month deliver to the said "Receiver, or such other person as may be appointed, a full and "detailed account of all revenues arising on the whole road, and of all "necessary disbursements out of the same, and pay over monthly to the "Receiver the proportion of the said Eastern Division of net revenues "of the said board.

"Now, therefore, if the said Milwaukee and St. Paul Railway Com- "pany shall faithfully comply with said order of said court and all "subsequent orders relating to the operation and management of the "said railroad between La Crosse and Milwaukee, and shall keep said "road and the rolling stock and property in good order, and shall man- "age and conduct the same to the best advantage of the public and the "creditors of the Milwaukee and Lacrosse Railroad Company, and "shall make monthly returns, and pay over the net revenues of the said "road according to said order, then this obligation to be null and void, "otherwise to remain in full force and virtue.

" The Milwaukee and St. Paul Company—by its president :
[SEAL.]

" D. M. HUGHES, *President.*

" D. M. HUGHES,	[SEAL.]
" AL'X MITCHELL,	[SEAL.]
" GEO. W. ROGERS,	[SEAL.]
" F. P. JAMES,	[SEAL.]
" N. A. COWDRY,	[SEAL.]
" RUSSELL SAGE,	[SEAL.]
" SELAH CHAMBERLAIN,	[SEAL.]
" HORACE GALPIN,	[SEAL.]
" W. H. WHIEE,	[SEAL.]
" A. FINCH,	[SEAL.]

" Signed, sealed and delivered in presence of—
" JOHN W. CARY.

" RUSSELL SAGE, JR., *Secretary.*

" June 13, 1863. The bond and the sureties approved by the Court.

" A. G. MILLER."

September 28, 1865. The Court made a final order or decree of sale, directing the sale of the Eastern Division of the railroad " *and also* " *all and singular the locomotive engines, cars, and rolling stock*, and " all the materials, tools, implements and utensils and other personal " property *which had been procured for or used in connection with said* " *roads or either of them prior to the appointment of Hans Crocker as* " *receiver of said road, except forty box cars numbered respectively* 330, " 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, " 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, " 388, 390, 392, 394, 396, 398, 400, 402, 404, 406 and 408, and in- " cluding as part of said mortgaged premises such proportion of the " rolling stock bought by the receiver since his appointment as the net " earnings of the Eastern Division of said railroad bear to the earn- " ings of the Western Division as ascertained by the report of H. L. " Palmer, and as confirmed by the Court."

This decree contained a provision saving the effect of the former order, as follows:

" It is further ordered and decreed that this decree shall not preju- " dice the rights of the Milwaukee and Minnesota Railroad Company, " under the order of the Court in this cause, made on the 10th day of " July, A. D. 1865, providing for the entry of said Company into " possession of the said mortgaged premises on certain terms and con- " ditions fixed by said order, and the said Milwaukee and Minnesota " Railroad Company shall be at liberty to avail itself of the provis- " ions of the said order, notwithstanding this decree, at any time before " the sale of said mortgaged premises in this cause."

In January, 1866, the Minnesota Company paid into Court over *four hundred and sixty seven thousand dollars*, in full for the amount of the decree, interest thereon and costs, gave the bonds required, demanded of the Receiver, and of the St. Paul Company, of the Eastern Division *and its rolling stock*.

The Receiver delivered the Eastern Division, but the St. Paul Company *refused to deliver the rolling stock*, according to the order and the final decree of the Court.

At the April Term of the Circuit Court, 1866, we moved to attach the officers and directors of the St. Paul Company, for contempt in disobeying the order and decree of the Court, This motion failed on a division of the judges.

Mr. Justice Miller, delivered his opinion as follows:

"The motion before us is for an attachment for contempt against the President and Directors of the Milwaukee and St. Paul Railway Company for refusing to deliver the rolling stock mentioned in the order of this Court of July 18, 1865.

"To enable us to understand the merits of the motion, it is necessary to mention the circumstances on which that order was founded

"At the April term 1864 of this Court, the mandate of the Supreme Court was filed in this case, directing this Court to enter a decree in favor of plaintiffs, for the full amount of their bonds and interest, and after deducting whatever sum might be in the hands of the Receiver applicable to the payment of said interest, to give the defendant a year in which to pay the remaining interest, and if not then paid, to sell the road and its appurtenances.

"The Minnesota Railroad Company, who owned the equity of redemption thereupon offered to pay into Court the sum due plaintiffs, on condition that the Receiver should be discharged, and the road and all its rolling stock placed in the possession of said Company. A motion to this effect was made, and was resisted by many parties; and among others, by the Milwaukee and St. Paul Railway Company, which had the actual possession of said road and rolling stock. The judges of this Court being divided in opinion on this motion, it was overruled; and the case was carried to the Supreme Court on other matters involved in the final decree.

"In the meantime the Minnesota Company had filed a bill in this Court against the St. Paul Company, setting forth its title to the rolling stock in question, and also setting forth the claim of the St. Paul Company to hold it under certain decrees and orders of this Court, and praying that their title might be established and the possession delivered to plaintiffs in that suit.

"The Milwaukee and St. Paul Company—by its president :
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"There was a demurrer to this bill, and on a hearing the judges of this Court were again divided in opinion, and the bill was dismissed.

"An appeal was also taken from this decree.

"Both these appeals came on to be heard in the Supreme Court at the same time, and that Court held in the latter suit that the proceedings in Chancery under which the St. Paul Company claimed the rolling stock, conferred no such right upon that Company, and that on the case made, the Minnesota Company was entitled to the relief prayed. As the case had been decided on demurrer, it was sent back, and the St. Paul Company had a right to answer, which they have done, and that case is now at issue.

"In the other case the Supreme Court reversed the order overruling the motion of the Minnesota Company, and sent down its mandate directing that an order be entered to discharge the Receiver, and let the Minnesota Company into possession if it should, within a time to be fixed by the Court, pay all that was due on the mortgage, which is the foundation of this suit.

"This order was accordingly made by this Court, on the 18th July last, allowing the Minnesota Company to redeem by paying the sum due, at any time before the sale of the property, which was to take place if the money was not paid within a year from the decree of September 1864, and ordering that if the money was so paid that then the Receiver and the St. Paul Company should deliver the road and all the rolling stock in controversy, to the Minnesota Company.

"On the first of January last, the Minnesota Company paid the full amount, interests and costs, that was then due on said mortgage, and demanded of the Receiver, and of the St. Paul Company, that they should deliver possession of all that the order of the Court required.

"The Receiver delivered the road and all the stock that was in his possession. The St. Paul Company delivered a part of the rolling stock—all, as they claim, that was necessary to enable the Minnesota Company to work their road profitably,—but refused to obey the order of the Court further, and this is the contempt for which the attachment is now asked.

"A part of this rolling stock was that which has been purchased by the Receiver, and which was conceded to belong to the Minnesota Company, and the St. Paul Company, in certain proportions, which had been fixed by the Court. But these proportions had reference to the entire value of such stock, and no partition had been made of specific pieces of such stock. The respondents in this motion have delivered, as is beyond question, very nearly that proportion in value, which the Minnesota Company is entitled to, and have accepted a proposition, made by the Receiver, to appoint two competent persons to make such division, and are willing to abide by their action. I do not think any order of this Court authorizes the Receiver solely to make such parti-

tion; and as to this stock, I do not think the respondents are in contempt.

"As to the remainder of the stock not delivered, they set up several grounds of justification for their refusal.

"1. That according to the English Chancery practice, another order, in addition to the main decree, is necessary, fixing a time within which the decree must be performed, before a party can be in contempt for non-performance.

"However this may be in the English Court of Chancery, which is always in session, and can always issue such orders on short notice, I am satisfied that such a rule is inapplicable to our practice, where the Courts are in session only at stated times, and where the vacation is the rule, and the session is the exception. Otherwise many orders of the Court would be delayed until they became useless to the party obtaining them, and yet no consequences attach on disobedience. The time in the present case is fixed with sufficient definiteness by the payment of the money to the Clerk; and the part performance of the order by the respondents shows that they labored under no difficulty on that subject.

"2. It is said that certain bonds required of the Minnesota Company. before said property should be delivered into their custody, were not sufficient.

"These bonds were, by the order of the Court, to be approved by the Clerk, and he has approved them. It is said that the sureties live in other States. That can be no objection in the Federal Courts, for it would be great injustice to require parties, who, in order to litigate in Federal Courts, must generally be non-residents to give resident sureties in large sums.

"The discretion confided to the Clerk, I am satisfied was well exercised, and as the bonds are not for the protection of the St. Paul Company, but for certain creditors of the Milwaukee and La Crosse Company, their sufficiency is of no consequence to the St. Paul Company.

"3. The respondents say further that since said order was made, they have discovered a mortgage of said rolling stock, made long ago to Bronson, Soutter and Knapp, which is a paramount title to said property, and therefore it should be delivered to the Minnesota Company.

"This Company, however, being owners of the equity of redemption, are entitled to possession until foreclosure, and I do not perceive that the mortgage to Bronson, Soutter and Knapp, confers upon the respondents any right to that possession, much less any right to disobey the decree of this Court.

"Several other technical, and as I think, frivolous reasons are given why respondents should not be compelled to execute the decree, which I shall not further notice.

"There is one reason however, and the only real ground on which, as I apprehend, respondents have acted, which I will notice. They say

they are the real owners of the property in dispute; that that property is still in litigation, as they are prosecuting appeals from all judgments deciding otherwise; and that it would be great hardship to take the property out of their possession, pending this litigation, especially as it would leave them without stock enough to work their road.

"I am quite sensible of the force of this reason, and have given to it all the consideration which it deserves; and if I could see any right which I had to interfere, I might endeavor to do something to compromise or mitigate the immediate hardship complained of.

"It is to be observed, however, that this claim of respondents to the property is the very matter which was passed upon in the decree now to be executed. No supersedeas bond was filed, or appeal taken, to stay the execution of the decree, until the case could be heard in the Supreme Court. Besides this very decree was entered in pursuance of the mandate of that Court. The only title ever yet set up, so far as I know, to that property by the respondents, was declared by the Supreme Court to be invalid, for, as I have already shown, a mortgage to Bronson, Soutter and Knapp can give no title to the St. Paul Company, and may never ripen into an absolute title in any one. Nor are they mortgagees in possession, for they are not mortgagees at all, nor even assignees of the mortgage.

"*This Court has at least three times decided that the St. Paul Company has no title to said property.* The presumption is in favor of the correctness of those decisions. Certainly in this Court I am bound by them. Now if these decisions be sound, it follows that for nearly four years the St. Paul Company *has had wrongful possession of this stock. Is it not* TIME *it should be given up?* Suppose, however, that these decisions are wrong, and shall be finally reversed, then their property will be restored to them in less than half the time which they have wrongfully held it, if these decisions are right.

"Under the decree which is here complained of, the Minnesota Company has paid nearly half a million of dollars, on the faith of obtaining possession of this property, when they had complied with that condition.

"They had demanded this decree as a condition precedent to investing so much money in an already heavily encumbered road.

"*How can this Court with any pretense of justice, now turn on them, and say, we will not enforce this decree?*

"Every decree of a Court which takes property from one man and gives it to another involves a hardship in the mind of a person dispossessed.

"In the present case, while that hardship may be a very heavy one, and work a temporary injury not easily repaired, *I see no way that I can avoid enforcing this decree, consistent with my duty to administer*

law and justice as a judge; and if I should refuse this motion, I see not how I can ever hereafter attach any person to compel him to execute a decree which he may be reluctant to perform."

"I do not think the parties here intended any personal disrespect to the Court, and I should impose no fine or penalty for what is past, but I conceive it to be the duty of the Court to compel obedience to its order now, by this process of attachment and imprisonment if it cannot be done without it."

Hon. Andrew G. Miller delivered an opinion, which he declined to file.

From that time to this the St. Paul Company has withheld the greater part of the rolling stock which it was directed to deliver to us, *in tranquil contempt of the Circuit Court and of this Court.*

The installment of interest falling due March 1, 1866, was paid out of money in the Receiver's hands.

The installment of interest which became due the 1st Sept. 1866, was not paid; and on the day of September, 1866, on a *mere* petition, verified by affidavit of that fact, the Circuit Court made an order for the sale of mortgaged premises; from which we appealed, (and by giving bond, obtained supercedeas) for two reasons:

"(1.) That such an order, in the *then condition of the cause*, could not be made without a supplemental bill filed for that purpose.

"(2.) That the sixty days grace, secured by the terms of the mortgage had not passed at the time the order was made.

This appeal the complainant moves to dismiss; and he also moves, by separate motion, to vacate the supercedeas granted on that appeal.

The Milwaukee and Minnesota Company move the Court here:

(1.) For a mandamus to compel the Circuit Court to enforce the mandate of this Court and its own decrees, in regard to the delivery of the rolling stock; and

(2.) For an attachment of the offices of said St. Paul Company, as for a contempt of this Court, in disregarding the decree of the Court below, made on a mandate from this Court.

I.

In regard to dismissing the appeal taken by the Minnesota Company from the order of sale for the installment of interest which became due September 1, 1866.

The appeal cannot be *dismissed*; for even conceding that the order of sale is the mere execution of the mandate of this Court, an appeal is the proper remedy if it be claimed that the Court below has erred in the premises. And on this motion, *where the merits of the appeal are not involved*, it must be presumed that the order appealed from is erroneous. The question here is, whether an appeal be the proper remedy to correct the error; and not, whether error has been committed.

A second appeal lies only when the Court below, "in carrying out the "mandate of this Court, *is alleged to* have committed an error." Grier J. Corning vs. Iron Factory, 15 Howard 466.

Blossom vs. TheRailroad, 1 Wallace 655.

Railroad Co. vs. Soutter, 2 Wallace 440.

Perkins vs. Fourniquet et. rex. 14 How. 328.

II.

As to the motion to vacate the supercedeas.

This motion is based upon a remark, a single sentence, of this Court in Perkins vs. Fourniquet, cited above, applicable to the facts of that case: "*The appeal would certainly not stay proceedings.*"

In that case, this Court say: "The mandate from this Court *left* "*nothing to the judgment or discretion of the Circuit Court*, but directed "it to carry into execution the decree of this Court, *which was recited* "*in the mandate.* And if the decree of this Court has been misun- "derstood by the Court below, to the injury of either party, we see no "valid objection to an appeal to this Court, in order to have the error "corrected."

The facts of this case are very different. All the matters to which the mandate related—that is, all decrees the mandate directed the Court below to make, had been made in September, 1865; and had been fully satisfied in January, 1866. The Receiver had been dismissed, and the *case was fully ended* so far as anything then remained to be done under the mandate of this Court.

It is true the original mandate directed that the decree to be entered should "*remain as security for subsequent accruing interest*, and ulti- "mately for the principal;" but the mandate did not determine the question as to when subsequent installments of interest would accrue; nor the manner in which the complainant should have the benefit of the decree. Of course that decree settled the *validity* of the mortgage, and precluded the defendants from ever questioning it again. But the decree did not construe the *terms* of the mortgage, nor determine on what precise days the interest would become due, so as to entitle the complainant to take proceedings under the decree. All this had to be determined in the Court below, by an examination of the mortgage, *and by a construction of its provisions* upon a point that had never before been involved in the litigation, had never been considered by this Court, was not mentioned in the mandate.

The complainant contended that by the terms of the mortgage as the interest was not paid on the 1st day of September, 1866, he was entitled to take legal proceedings immediately; we contended that by the terms of the mortgage, he could not take any proceedings until the installment of interest had remained unpaid *for the term of sixty days.*

In the previous proceedings in the Circuit Court, under the mandate of this Court, it was always understood that the provisions of the mortgage were conclusive upon this subject; and in making the first order of sale, the Court, Justice Miller and Judge Miller decided that the provision in the mortgage must govern as to the length of time the sale should be advertised; the mortgage requiring twelve weeks notice, while the general law of the State requires but six. This was decided after full argument and upon authorities produced by us upon the subject. Certainly no Court in this litigation had decided otherwise, previous to the decree appealed from. And the Court to decide the question had to look beyond the mandate, which was silent upon the subject, to the mortgage itself, to determine whether or not there was then a *default under the mortgage.* The Court had *to construe the terms of the mortgage* in this respect: this involved the exercise of judgment and judicial discretion; and we claim the court erred in the

construction it put upon the mortgage. Whether it *did* err *or not*, constitutes *the merits of this appeal*, and is not to be examined here. It is enough for us to say at present, that in making the order of sale appealed from, the Court was exercising a judicial discretion upon a point never considered in, nor settled by this court; a point upon which the mandate was silent, and that we claim the Court has committed an error. This entitles us to the opinion of this Court upon that subject; *and the law* entitles us to a stay of proceedings *upon giving a bond*, which *we have given* to the satisfaction and approval of the judge of the Court below.

2. We claim also, that although the original decree of this Court is to "*remain as security* for subsequent accruing interest, and ultimately "for the principal;" thus precluding all question as to the validity of the mortgage and bonds to their full nominal amount; yet after the amount of interest due was fully paid in January, 1866, together with all costs, the receiver discharged and the property passed over to us; that on a subsequent default, the complainant must file a supplemental bill, setting out the original decree, the subsequent default, and praying for the benefit of that decree and for a sale of the road. That to this we can answer any matter of defence happening since the original decree; can contest the fact of non-payment; show a valid agreement to postpone the payment; an accord and satisfaction; or any other matter of defence *which is consistent with all that this Court determined against us in the original decree.* And we claim that these things cannot be properly contested on a motion by affidavits. In this we may be *right* or *wrong*; but it is certain that on this point we are not precluded by the mandate of this court, *which says nothing upon the subject.*

If the argument of our opponents be sound, then *nothing* that the Court below *could do or decide* in any subsequent proceedings under this decree could be the subject of appeal, with supercedeas. By the terms of the mortgage, the semi-annual installments of interest are $40,000; now, (begging pardon of the Court below for supposing it might do anything so clearly erroneous); suppose the Court should enter a decree for $50,000; or should make a decree of sale on an affi-

davit of the complainant that the money had not been paid, opposed by forty affidavits *that it had been paid and accepted*; is it possible that we could not appeal and have supercedeas? The argument of our opponents is this: conceding on the authority of *Perkens v. Fourmquit* that the party cannot have supercedeas on an appeal from a decree which *this Court has commanded that Court to render*, therefore he cannot appeal from a decision subsequently made, which this court has not directed, has not even considered. Neither of the objections made by us in the Court below, had ever been made before, because the case had never called for it, neither has ever been considered, much less decided, by this Court; neither was precluded by the mandate. In passing upon these questions the Court below exercised a judicial discretion and rendered a decision never exercised or rendered in this case before; and we are entitled to revise it here, and to have supercedeas while the appeal is pending.

III.

The bond given to obtain supercedeas, was approved by the Judge of the Court below.

It is true that he says, together with his approval, that he reserves the question of the validity of a bond, signed by non-resident sureties, to be passed upon by this Court. But this reservation is like a reservation in a deed which is repugnant to the grant, merely void. The validity of the bond is a question for *that Judge* to pass upon. He has passed upon it, and has approved the bond. He could not refer that question to this court. If he was satisfied with the bond, it was his duty to approve it. He has approved it; that ends the question. There is no appeal on that point; no provision of law that "when THE JUDGE shall be DIVIDED in opinion" upon that subject, he may approve the bond; and yet reserve for this Court the question of the validity or sufficiency of the bond. Suppose, in an equity case, the Court below should make a decree in favor of the complainant, and should recite that it reserved to the defendant the privilege of having the Supreme Court pass on his defence. Would not this reservation be a nullity? Would it give a

right to appeal, when the law gave no appeal? Or would it qualify the effect of the decree in a case that might be appealed, unless such appeal should be taken? And in either event, would not the defendants rights depend upon the law, and not the reservation in the decree?

2. But the Judge was right in approving the bond. It is no objection that the sureties are non-residents. The Act of Congress requires "sufficient security." The Judge has no right to amend the statute by construction to read "sufficient security, *from persons who are residents of the district*." This would be clean legislation, engrafting an independent provision npon the act by construction. I concede that a man is to be pitied who does not reside in Wisconsin; yet he may "*be sufficient*" security for all that. Shylock says: "My meaning in saying he is a good man is to have you understand me *that he is sufficient*" &c. And under the Act of Congress "a *good* man is sufficient." A bond that would satisfy Shylock ought to satisfy the indulgent and charitable discretion of a Chancellor. The Judge, in this case, has no fears of the sufficiency of the security; his misgiving is as to their residence.

There is a reason why Congress did not require resident sureties. And under our Federal system, a non-resident might be deprived of his rights altogether, if required to give resident security. Take a class of cases—for instance, farm-mortgages in Wisconsin, where our farmers have formed political organizations, nominated State Judges, and supported and opposed candidates upon the very issue of the valid ty of these mortgages; and suppose the feeling just a little deeper than it is, a resident who should sign a bond for a stranger against his neighbor, would be mobbed. In such cases to require such security would be *a denial of justice to non-residents in a Court created for the very purpose of protecting them against local feeling and the prejudices of local Courts.* Congress not having required *resident* sureties, the Courts cannot add that as a qualification to the act.

IV.

As to the appeal of Fleming.

The only ground of this motion, not included in the motion to dis-

miss the appeal of the Minnesota Company, is that he is not a party to the record.

This court in this very case—1 Wallace 305, decided to treat Fleming as a party, who by his answer had interposed a defence "indepen-" dent of the company and of its directors," and had become "a real " and substantial party to the extent of his own interests &c., "and " against whom any proceeding, order or decree of the Court in the cause " is binding and may be enforced."

This would seem to settle the question.

V.

As to our motions to enforce the mandate of this Court, and the decrees of the Circuit Court thereon, in relation to the delivery of the rolling stock :

(1.) By attaching the officers of the St. Paul Company, and sequestrating its property, as for a contempt of this Court ; or,

(2.) For a mandamus to the Court below, directing that Court to compel obedience to its decrees.

These two motions are made in the belief that one or the other must be proper, and with the expectation that one must be granted and the other denied.

First. THE ST. PAUL COMPANY AND ITS OFFICERS ARE GUILTY OF A CONTEMPT OF THIS COURT, FOR WHICH THEY MAY BE PUNISHED HERE.

When this Court decides a cause and remits it to the Court below, with directions to make a certain order or decree, the same, when so made, is the order or decree of this Court, and disobedience thereto *must be a contempt of this Court*: "For when the decree [of the "Court below] is either affirmed or reversed by the appellate Court, it "becomes the decree of that Court," &c,—*Grier J. Corning vs. Iron Factory*, 15 *How.* 466.

VI

As the Circuit Court, upon the mandate, entered orders and a decree, as this Court had directed, disobedience thereto by the St. Paul Company, *was clearly a contempt of that Court*; and when the party brought the fact to the notice of the Court, an attachment should have been issued.

An attachment is the only remedy a party has in such case, to enforce a decree. It must therefore be a proceeding *the party is entitled to for that purpose*; and to deny it, in the proper case, is to deny the party injured the only remedy he can have to enforce his adjudicated rights.

An appeal from the refusal of the Court below to issue the attachment, is not the appropriate remedy; because on the appeal this Court could only adjudge the parties right, which it has already done; and the second mandate would be no more efficacious than the first.

This Court directed the Court below to enter an order requiring the delivery to us of the rolling stock pertaining to the Eastern Division, on payment by us of the amount due; this order the Circuit Court entered; we paid the money, and demanded compliance with the order. This was refused, *and the refusal was clearly a contempt of the Circuit Court.* We then applied for an attachment; this the Circuit Court refused; we now apply to this Court for a mandamus, to compel the Circuit Court to perform this plain duty.

(1) That the attachment is the proper remedy to enforce the decree.

2 Dan'l Ch. Pr. (Perkins Ea.) Ch. 25, Sec. 7 and Notes, and cases cited.

Circuit Court Equity Rules 8, 10.

(2.) A mandamus is the proper remedy to compel the Court below to execute a decree which that Court has rendered; and that too although an appeal has been taken, without supercedeas.

Stafford vs. Bank of Louisiana, 16 How. 135.

Same case, 17 How. 275.

The only way the order and decree of the Court below can be carried into execution is by a writ of attachment as for contempt. The mandamus should therefore command the Court below to issue this writ, and proceed thereon to enforce the decree according to law and the practice of the Court in such case. We have adopted the same method of bringing the matter before this Court that was pursued and approbated in the case last above cited.

VII.

This brings us to the merits of our application, and to consider the excuse set up in the Court below, for disobedience to the plain language of the mandate of this Court, and the order and decree made by the Circuit Court in obedience to the mandate.

The record, in this Court, shows, that the mortgage to foreclose which

this suit was commenced, mortgaged to Bronson and Soutter, the Eastern Division of the La Crosse and Milwaukee Railroad from Milwaukee to Portage, together with all the rolling stock pertaining thereto; but did not specify what amount or precise description of rolling stock did belong to the portion of the road mortgage.

To settle this question the Court below, March 11, 1861, made an order of reference as follows:

"And it is further ordered by the Court that the said masters ascer-
"tain and report the whole amount of rolling stock on the whole road,
"and that they specify the quantity thereof, *that is covered by and in-*
"*cluded in* the first mortgage, and also in this mortgage and the mort-
"gage of Greene C. Bronson, James T. Soutter, and Shepherd Knapp."

Oct. 7, 1861. The masters reported as follows:

"We have also ascertained the whole amount of rolling stock on the
"whole road. The amount thereof, at the cost price, was at the date of
"filing the bill of complaint in this cause, five hundred sixty-nine
"thousand six hundred and thirty-five dollars and seventy-eight cents.
"And an additional amount of fifty-three thousand six hundred dollars
"has been purchased since the filing of the bill of complaint, making
"the whole amount now on the road, six hundred twenty-three thousand
"two hundred thirty-five dollars and seventy-eight cents, ($623,235.78.)
"And we have ascertained, and do further report, that of the said
"rolling stock, forty box cars, amounting at the cost price thereof,
"to thirty-one thousand nine hundred and seventy-nine dollars and six-
"ty-four cents, ($31,979.64) and numbered 330, 332, 334, 336, 338,
"340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366,
"368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394,
"396, 398, 400, 402, 404, 406 and 408, are covered by and included in
"the mortgage of Greene C. Bronson, James T. Soutter and Shepherd
"Knapp, and no other. And all the remainder of the said rolling stock
"is covered by and included in the first mortgage upon the said railroad
"*and in the complainants' mortgage specified in the bill of complaint.*"

The Court, January 7, 1862, made an order modifying this report so as to declare that all the rolling stock, except the forty box cars, was covered by and included in the first mortgage—the Palmer mortgage. The description of rolling stock in that mortgage is as follows: "Together with all locomotives, engines," &c., "now owned, or hereafter
"to be acquired by said company, and in any way belonging or apper-
"taining to said railroad, now constructed or to be constructed *within*
"*the limits aforesaid*"—Milwaukee and Portage, the termini of the Eastern Division.

The Court below was of opinion that the mortgage in suit did not cover the rolling stock, pertaining to the Eastern Division; but in all other respects, the Court confirmed the master's report. So that the adjudication of the Court, as well as the report of the masters, decided that all the rolling stock, except the forty box cars, *belonged to the Eastern Division, from Milwaukee to Portage*; and was not included in the Western Division mortgage, to Bronson, Soutter and Knapp.

In this stage of the case, the Milwaukee and St. Paul Company, which had or claimed to have become, the purchaser of the Western Division, together with the forty box cars mentioned and described in the decree in that cause, obtained June 12, 1863, an order in this cause, made by the District Court, after that Court had ceased to have jurisdiction of the case, directing the Receiver in this cause to deliver to that Company the said Eastern Division, and "the appurtenances and property, and rolling stock thereto belonging, on first giving a bond to the "United States, for the use and benefit of all interested, with "sureties to be approved by the Court, in the penalty of one hundred "thousand dollars, conditioned that the said company will faithfully com- "ply with this order of Court this day made, and any subsequent orders "relating to the operation and management of the said railroad between "La Crosse and Milwaukee, and will keep said road and the rolling stock "and property in good order, and shall manage and conduct the same to "the best advantage of the public and the La Crosse and Milwaukee "Railroad Company, and shall make monthly returns, and pay over the "net revenues of said road, according to this order."

On the same day the St. Paul Company gave a bond in the penal sum of one hundred thousand dollars, reciting the possession of said Eastern Division "and rolling stock pertaining thereto," and conditioned, among other things, to keep said "rolling stock in good order," &c., &c. And thereupon the Receiver did deliver to that company, the said Eastern Division, and rolling stock pertaining and belonging thereto.

This Court subsequently decided this order to be *absolutely void*, because the District Court had no jurisdiction of this cause when said order was made.

Bronson vs. Railroad, 1 Wallace 405.

The Minnesota Company then applied to the said Circuit Court for leave to pay into Court the whole amount claimed by the complainants, and to be let into possession of the property. This was denied, by division of Judges, and we appealed. On the hearing of the appeal, this Court sent its mandate to the Court below, *commanding it to put us into possession of the Eastern Division and its rolling stock, on paying the amount due and all costs, and giving certain bonds.*

Under this mandate, the Court below, July 18, 1865, made the order quoted at length hereinbefore; providing and directing that on payment of the amount due, and giving certain bonds, the "said Receiver, Hans "Crocker, and the said Milwaukee and St. Paul Railway Company, its "officers, directors, agents and employees, deliver over to said Milwaukee and Minnesota Railroad Company, the Eastern Division, so called, "of the La Crosse and Milwaukee Railroad, so called, from Milwankee "to Portage, together with all the rolling stock that was on the whole of "the La Crosse and Milwaukee Railroad, or belonged or appertained "thereto when said Receiver was appointed, except forty box cars, "numbered as follows, viz: 330, &c., and also deliver to said Milwaukee "and Minnesota Railroad Company such proportion of the rolling stock "that was purchased by the Receiver as 121,178 dollars bears to "26,199 dollars, together with all the rights, privileges and franchises, "and personal and other property belonging or in any wise appertaining "to said Railroad from Milwaukee to Portage, and that the said Receiver "be thereafter dismissed and discharged except for the purpose of passing his accounts."

Afterward, on the 28th of September, 1865, this cause came on for a final hearing and order for sale, and the Court below entered its decree for the sale of the Eastern Division, from Milwaukee to Portage, "and also all and singular the locomotives, engines, cars and rolling stock * * which had been procured for or used in connection with said roads, or either of them, prior to the appointment of Hans Crocker as Receiver of said road, except forty box cars, numbered respectively 330," &c.

This decree further provided that "the said Milwaukee and Minnesota Railroad Company shall be at liberty to avail itself of the provisions of the said order [the order above quoted] notwithstanding "this decree, *at any time before the sale of said mortgaged premises in "this cause.*

Thereupon, upon the faith and credit of the mandate of this Court, the order of the Court below of July 18th, 1865, repeated and confirmed by the final decree in this cause, the Minnesota Company paid into Court over $467,000, the full amount due, including costs, gave the bonds required by the mandate and the order of the Court below; and demanded of the receiver and of the St. Paul Company, the said Eastern Division and the said rolling stock pertaining thereto.

The Receiver delivered the road and a very small amount of rolling stock which was in his possession, demanded of the St. Paul Company that it should return the rolling stock to him so he could deliver that also; which that Company refused to do; and to our demand for said rolling stock, that Company flatly refused to deliver the same.

We apply to the Court below for an attachment to compel obedience, and that Court, by division of its judges, refuses to grant the writ.

At the same term, the St. Paul Company applied to the Court to modify the order of July 18th, 1865; and both judges concurring, this motion was denied.

The Circuit Court thus placed itself in this peculiar position; it decided at the same term:

(1.) That the order of July 18, 1865, was right, and ought not to be modified; and

(2.) That although right, it ought not to be executed.

The *pretence*—it deserves no better appellation—upon which the St. Paul Company claimed in the Court below to justify its disobedience, was that it was the owner of the property, even before it received the same from the Court, and gave the bond before cited.

FIRST.

We claim, *even conceding that the St. Paul Company did own the property prior to June* 12, 1863, that having obtained possession under an order of the Court upon giving said bond, that Company is estopped *for all the purposes of this motion*, from setting up such prior title as an excuse for its disobedience to the subsequent order of the Court, to deliver the same to the Minnesota Company.

Prior to, and on the 12th June, 1863, the Court below was in possession of this property by its Receiver. The cases settle beyond all dispute that where a Receiver is holding property, *the possession is that of the Court*. Some of the cases say "the Court is the landlord," the Receiver being only the officer of the Court. From this landlord of our property—the Court below—the St. Paul Company on the 12th June, 1863, obtained temporary possession; now when ordered to return the property, can it set up an outstanding title? If A. leases land to B. and at the expiration of the term the landlord demands possession, which is refused, and takes legal proceedings to recover it, (it is too well settled to need citation of authorities,) the tenant is estopped to set up any outstanding title in himself to defeat his landlord. *He must first surrender the possession he acquired under the lease, and then assert his title.*

The same principle applies where, as in New England for instance, property is attached on *mesne* process; and delivered by the marshal or sheriff to a receiptor. In an action brought by the sheriff, the receiptor is estopped to set up prior title in himself.

Now is it possible that a Circuit Court of the United States is more powerless in such case than its own marshal, or than even a private citizen? Here was a railroad of ninety-five miles with rolling stock, worth millions of dollars, in the custody of a Federal Court. The Court, for temporary convenience puts it into the possession of this St. Paul Company. When it directs the Company to return the property, its order is met with disobedience, which the Company seek to justify by pretending title to the property prior to the possession obtained by the Court.

2. Treating this order of June 12th 1863 as valid, the St. Paul Company became the Receiver of the Court.

Treating this order as void, the property remained in contemplation of law in the hands of the Receiver, and the St. Paul Company must be considered as having obtained the property from him without right, and in contempt of the Court.

In De Winton vs. Mayor of Brecon, 28 Beavan 200, the Court say: "I apprehend this is clear, that the Court never allows any person to

" interfere either with money or property in the hands of its Receiver, " *whether it is* done by the consent or submission of the Receiver, or " or by compulsory process against him. The Court is obliged to keep " a strict hand over property in the hands of a Receiver, in order to " preserve entire jurisdiction over the whole matter, and to do what is " just in the cause between the parties."

(3.) To obviate this difficulty, the St. Paul Company contends that it did not receive this property under the order of 12th Jvne, 1863, in this cause, but as purchaser under an order of same date, in the Western Division foreclosure suit.

The facts are these. The Court first appointed a Receiver of the whole road, and all the rolling stock on the whole road in the Howard case, which was a judgment creditor's suit. Subsequently it appointed a Receiver — the same person — in the Western Division case, of that Division and its rolling stock ; and in the Eastern Division case, appointed same person Receiver of the Eastern Division and its rolling stock. The Receiver held the whole road, and all the rolling stock as an entirety, and there never was any separation of the rolling stock, after the Receiver took possession.

In the Western Division case, the Court made reference to ascertain how much of the rolling stock belonged to that Division, and was included in that mortgage. The masters answered forty box cars only. The complainants excepted to the report, and claimed all the rolling stock ; the Court overruled their exception, and made a decree directing the sale of the Western Division and forty box cars only, of the rolling stock.

So far these orders have all been construed by this Court, between these parties, and determined to be just what I have stated.

Minnesota Co. vs. St. Paul Co. 2 Wallace 609.

After their purchase, at the Western Division sale, had been confirmed by the Court, to their petition for possession, the Court replied by an order, May 7, 1863, as follows :

" Whereupon it is ordered by the Court, (Mr. Carpenter in behalf of " the Milwaukee and Minnesota Railroad Company, and Mr. Ryan in " behalf of William Crawshay and Orville Oddie objecting) that the " Receiver deliver over to the said Milwaukee and St. Paul Company " the said railroad and appurtenances between Portage City and La

" Crosse, *and the rolling stock and property specially described in the* " *decree.*

" And it is further ordered by the Court, that a full and perfect in- " ventory be taken by the Receiver of all rolling stock *other than* " *the forty box cars specially mentioned in the decree*, and of all person- " al property belonging to the said La Crosse and Milwaukee Railroad " Company, including such as have been procured by the Receiver and " now on hand, and that he make report of the same on the eight day of " June next.

" And as in pursuance of the act incorporating the La Crosse and " Milwaukee Railroad Company, a continuous road has been constructed " and operated between La Crosse and Milwaukee, and the interest of " the public requiring that the said road, as constructed and operated, " shall continue to be so operated, it is ordered by the Court, (reserving " the right to rescind, change or modify this order at any time hereaf- " ter) that the said Milwaukee and St. Paul Railway Company, and the " Receiver who continues to be the Receiver of the Eastern end or Di- " vision of said La Crosse and Milwaukee Railroad between Milwaukee " and Portage City, jointly operate said road between La Crosse and " Milwaukee without interruption, and that the said Milwaukee and St. " Paul Railway Company, and the said Receiver, jointly employ all the " agents and persons necesary for the proper operating of said road ; " that the revenues of said road be paid to the Receiver as heretofore, " who shall keep all accounts and books for the inspection of the said " Company, and said Company may keep duplicate books, and that all " payments and disbursements for necessary expenses in operating said " road shall be paid out of the joint fund, each division of said road " to be entitled to its proportion of revenue and to be charged with its " proportion of disbursements, and that the said Receiver pay coupons " of bonds in prior mortgages as heretofore."—Record, 104, 105, 106.

This order gave the St. Paul Company possession of all it had purchased ; although under the possession, that Company was required to operate its road in connection with the Eastern Division still in the hands of the Receiver. The order to deliver possession is carefully drawn, and confined to the Western Division and the forty box cars *specially described in the decree.*"

On the 12th June, 1863, the Court had determined to permit the St. Paul Company to operate the Eastern Division in connection with its own division, and to release the Receiver from all duty in that behalf. Two orders were therefore made on that day, as follows :

WESTERN DIVISION CAUSE.

"On consideration of the said petition of the Milwaukee and St. Paul Railway Company, and of the arguments of counsel, it is ordered by the Court that there be delivered over to the said Milwaukee and St. Paul Railway Company all and singular the railroad between the city of La Crosse and Partage City, its roadbed and track, with its depots, station houses, engine houses, and all other property belonging to the said railroad between the said points; and the forty box cars mentioned and described in the decree.

"And also the share or proportion of the rolling stock and personal property purchased by the receiver, as mentioned in the decree.

"And also, *subject to other or previous liens or claims*, the possession of the rolling stock on hand when the Receiver took the same under the order of the Court. And it is further ordered by the Court, that the said Receiver be and hereby is discharged as such from the management and control of the said Western Division of said railroad under the appointment in this case, subject, however, to the final settlement of his accounts, *and subject to the orders* made or to be made in this case, and in the other cases in which he was appointed or may hereafter be appointed."—

EASTERN DIVISION CAUSE.

After reciting the petition of the St. Paul Company, &c., &c.

"It is thereupon ordered by the Court that the order appointing a Receiver in this case be modified in the manner following, *subject to any further or other order rescinding, altering or modifying this order now here made:* That the Receiver let the said Milwaukee and St. Paul Railway Company into the possession of the Eastern Division of the La Crosse and Milwaukee Railroad, from Portage City to Milwaukee, with the appurtenances and property and rolling stock thereto belonging. And that the said Milwaukee and St. Paul Railway Company subject to the further order or orders of the said Court, operate said Eastern Division of said railroad in connection with the said Western Division thereof, so that one continuous line of Railroad between La Crosse and Milwaukee may be operated and conducted as directed in the original charter of the La Crosse and Milwaukee Railroad Company, without hindrance, interruption or diversion, the same as if the whole line of road continued to be in one company, in pursuance of said charter and not otherwise.

"And it is further ordered by the Court that the said Milwaukee and St. Paul Railway Company, shall at all times allow and permit the Receiver, or such other persons as may be at any time appointed for that purpose, to have daily access and examination of the records, books, papers, accounts, proceedings, receipts and revenues, and also of the transactions of the said Milwaukee and St. Paul Railway Company and of its Board of Directors, in relation to the business and operation of the whole line of road, and that the said railway company shall, out of the revenues of said road, *keep the said Eastern Division and all the rolling stock in good order*, and defray all running and other necessary expenses, and at the end of every month deliver to the said Receiver, or such other person as may be appointed, a full and detailed account of all revenues arising on the whole road, and of all necessary disbursements on of the same, and pay over monthly to the Receiver the proportion of the said Eastern Division of the net revenues of the said railroad. And that the said Receiver make monthly returns as heretofore, of his accounts into Court, and disburse the moneys by him received from to time, in the payment of liens and debts of the said La Crosse and Milwaukee Rail-

road Company according to their priorities and equities.

"And it is further ordered by the Court that before the said Milwaukee and St. Paul Railway Company be permitted to have possession under this order, the said company, by its constituted officers, shall enter into a bond to the United States, for the use and benefit of all interested, with sureties to be approved by the Court, in the penalty of one hundred thousand dollars, conditioned that the said company will faithfully comply with this order of Court this day made, and any subsequent orders relating to the operation and management of the said railroad between La Crosse and Milwaukee, and will keep said road and the rolling stock and property in good order, and shall manage and conduct the same to the best advantage of the public and the La Crosse and Milwaukee Railroad Company, and shall make monthly returns and pay over the net revenues of said road, according to this order."—

The order in the Western Division cause deserves particular attention. It orders the Receiver :

(1.) To deliver to the St Paul Company full possession of the Western Division ; "*and the forty box cars mentioned and described in the decree.*"

(2.) To deliver also full possession of the "share or proportion of the rolling stock or personal property purchased by the Receiver, *as mentioned in the decree ;* thus terminating the joint occupancy with the Receiver with which that possession had been burthened by the order of May 7th.

So far, the order is absolute ; and shows by the repetition of the words at the end of each clause, "*mentioned and described in the decree,*" that the Court was delivering possession of what the St. Paul Company had *acquired title to* by its purchase under the decree.

Then the order proceeds to direct the Receiver to deliver also, subject however to all "OTHER or *previous liens* or CLAIMS, the whole rolling stock on hand when he was appointed, that is, the remainder of the rolling stock except the forty box cars, which belonged to the Eastern Division, and of course *was not mentioned and described in the Land Grant Decree*, therefore this clause is not followed, as the others were, by these words, "*mentioned and described in the decree.*"

Considering the careful and guarded language of this order, it is impossible not to see that the Court was drawing the distinction, in what it ordered to be delivered to the St. Paul Company, between that which belonged to them by their purchase under the decree ; that is, the Western Division the forty box cars and the proportion of rolling stock purchased by the Receiver ; and that which was delivered to them temporarily, but *not by virtue* of their purchase *under the decree.*

The Court in substance said—"take absolutely all that was purchased by you under the decree—the Western Division forty box cars, and the proportion of rolling stock purchased by the Receiver ; this you have purchased. The remainder of the said rolling stock has been ascertained to belong to the Eastern Division, and it must there remain ; but we give it, *with the Eastern Division*, into your possession tempo rarily ; that the whole may be operated together."

2. Turn now to the order in the Eastern Division cause. The Court had decided that all the rolling stock except forty box cars, was included in the Eastern Division first mortgage : that is, that it belonged to the railroad *between the limits of Milwaukee and Portage ;* because such is the description in that mortgage. The Court had determined for reasons of public policy, etc., set forth in the preamble to this order, to give the St. Paul Company the possession of the Eastern Division mortgage premises, temporarily. This order gives to the St. Paul Company the possession of the Eastern Division "*and rolling stock thereto belonging,*" but subject nevertheless "*to any further or other order rescinding, altering or modifying this order now here made.*"

How absurd to pretend that the Court in this order regarded the rolling stock pertaining to the Eastern Division, as having been purchased by the St. Paul Company. Did a Court ever yet put a purchaser into possession after final decree and confirmation of sale, "*subject to any further order rescinding*" *the same?* This right reserved to the Court to *rescind* the order giving the St. Paul Company the Eastern Division "and the rolling stock belonging thereto," is conclusive that the Court was granting to that Company a *favor* and not a *right;* a temporary possession, not a title.

It is to be kept in mind that there is no rolling stock covered by and included in a mortgage, except it is a part of the premises described in the mortgage. The Eastern Division first mortgage granted the rolling stock pertaining thereto "between the limits" of Milwaukee and Portage. Therefore, when the Court decided that all the rolling stock that was on the road when the Receiver took possession, was covered by and included in that mortgage, it thereby decided that it was rolling stock pertaining to the Eastern Division "between the limits aforesaid," because that mortgage expressly declared that it covered no other rolling stock or property; and the Court also decided that the said rolling stock pertaining to said Eastern Division was to be regarded as a *fixture* upon that Division.

See the premises of that mortgage.

Therefore, the order that gave the St. Paul Company temporary possession of the Eastern Division "*and the rolling stock belonging thereto*" gave all the rolling stock on the road when the Receiver was appointed, except the forty box cars, and this possession was expressly given *subject to be rescinded by the Court.*

In an opinion delivered by His Honor, the District Judge, at the April term, 1864, and published May 12, 1864, nearly a year after these orders, the judge says:

"The first duty of the Court is to secure the interests of the public, under the grant of the charter of the La Crosse Company. The second duty is to protect the rights of the lien creditors and the parties litigant. The Receiver was appointed for these two purposes.

"For this purpose the orders of the 12th of June, 1863, in this [Eastern Division] case and in the Howard case modifying the original orders, appointing the Receiver, were made. The Milwaukee and St. Paul Company were allowed by those last orders to operate temporarily the Eastern Division of the road in connection with the Western Division, of which they were owners for the sake of economy in operating the road *to secure the use of all the rolling stock on the whole line, and to restrain the St. Paul Company from diverting trade and travel from the Eastern Division.* It was known that the St. Paul Company were about to connect their Division, from Portage City with the Watertown road, and thence to Milwaukee, *which might affect the Eastern Division.*

"The order allowing that Company to operate the Eastern Division,

subject to the control of the Court and the supervision of the Receiver, and under heavy bonds with adequate security, *prohibited them from putting a car on the extension from Portage or on any other road east of that point.* I considered it a proper duty for the public and the parties *to secure the use of a continuous route according to the charter without interruption or deviation of trade or travel* between the termini of the road.

Here is the opinion of the Judge who made these orders, as to what was his intention in making them.

It is to be remembered that the order of the Court upon the Master's Report, declared that all the rolling stock, on the road when the Receiver was appointed, and the proportion of rolling stock purchased by the Receiver and not belonging to the Land Grant Mortgage, belonged to the Eastern Division first mortgage; and the language which gave the Eastern Division mortgage that proportion of stock is identical with that which gave the Eastern Division mortgage all of the original stock, except the forty box cars. If the St. Paul Company may take one class of stock, it must take the other, by irresistible reasoning, and leave the Eastern Division without a car. Yet the judge in this opinion says his orders of June 12, 1863, *restrain and prohibit* the St. Paul Company from *taking a car* from the Eastern Division.

SECOND.

But still more conclusive answers remain to this claim of the St. Paul Company, that it took possession of the rolling stock belonging to *the Eastern Division* as a purchaser at the sale under the decree in the Western Division case. That order was void for the following reasons:

1. Conceding the District Court to have had that case on that day, it had no jurisdiction over the Eastern Division and the rolling stock belonging thereto. The Court had already in that case decided, by overruling exception to the masters report on that subject, that only forty cars belonged to the mortgage premises in that case; and that all the remainder belonged to the Eastern Division; *and that had passed into the Circuit Court and was* held by *its* Receiver, *in the foreclosure suit on that Division.* The bill in the Western Division case asked no relief as to the Eastern Division or its rolling stock; and the Court in that cause

had no more jurisdiction over the Eastern Division and its rolling stock than it had over any particular forty acres of land in the State of Wisconsin. Therefore any order the Court might have made in regard to the title of property not belonging to the mortgaged premises in that cause, *was merely void.*

McCall vs. Carpenter, 18 How. page 302.
Shriver vs. Linn, 2 How. 43.
Laverty vs. Moore, 32 Barber, N. Y. 347, and cases cited.
Brigandello vs. Gray, 1 Wallace 627.
Minnesota Co. vs. St. Paul Co., 2 Wallace 640.

2. BUT THE DISTRICT COURT HAD NO JURISDICTION OVER THE WESTERN DIVISION SUIT ON THE 12TH DAY OF JUNE 1863.

In Bronson vs. Railroad, 1 Wallace 405, this Court decided that under the Act of Congress of July 15, 1862, extending the Circuit Court system to the State of Wisconsin, and the supplemental Act of March 3, 1863, all suits pending in the District Court on the 15th July 1862, in which any proceeding remained to be taken to complete the final disposition of the cause, passed to the Circuit Court.

This cause after the Act of July 15, 1862, was entered in the Circuit Court; and a previous sale which had been held, was reported to the Circuit Court, and that Court set aside the sale, and ordered a re-sale, which was advertised under the authority of the Circuit Court and was pending when the Act of March 3, 1863 was passed. This last sale, ordered by the Circuit Court, is the one under which the St. Paul Company became the purchaser of the Western Division. The plain meaning of the decision of this Court in Bronson vs. Railroad, 1 Wallace 405, is, that if anything remained to be done in the cause fully to determine the rights of the parties, or involving the exercise of any judicial discretion, the case went to the Circuit Court.

The confirmation of a sale is an act involving judicial discretion, from which a party may appeal to this Court.

Blossom vs. Railroad, 1 *Wallace* 655.

But however this may be, there remained other questions in this Western Division cause that clearly sent it to the Circuit Court, under the decision of this Court, in Bronson vs. Railroad, 1 W. 405.

Chamberlain was a defendant, the masters had reported that there was some five hundred thousand dollars due on his judgment; and he had exhibited eleven exceptions to the report, claiming over a hundred thousand dollars more than the masters had allowed him.

The Court made an order on these exceptions Dec. 9, 1861, (Land Grant Record page 136,) as follows:

"And it is further ordered by the Court that the sixth and seventh "exceptions of Selah Chamberlain to said report be, and hereby are "allowed, and that the tenth exception of said Chamberlain be and "hereby is overruled.

"*And it is further ordered that the remaining other exceptions of said Selah Chamberlain be held by the Court for further consideration.*"

These reserved exceptions, involving more than a hundred thousand dollars, claimed by Chamberlain and denied to him by the masters, remained for future hearing and determination, when the act of July 15, 1862, and the act of March 3, 1863, were passed, and whatever this Court may say as to confirmation of a sale, it would seem too clear for doubt, that these undecided exceptions took this case to the Circuit Court under the decision of this Court in Bronson vs. Railroad, 1 W. 405.

3. But a still more conclusive objection to the validity of that order, remains to be stated. There is no chance for difference of opinion upon one thing: that this Court, in the case last cited, decided that the District Court under the act of March 3, 1863, could only *execute rendered decrees* and protect its officers in executing them. That it was, after the act of July 15, 1862, powerless to settle any rights between the parties; *it could only enforce such rights as it had before that time established.*

This Court in *Minnesota Co. vs. St. Paul Co.* 2 *Wallace* 609, decided two things:

(1) That the mortgage on the Western Division did not include the rolling stock pertaining to the Eastern Division; and

(2.) That whether it did or not, the St. Paul Company did not, under *the decree, sale* and *confirmation*, acquire title to any but forty box cars.

This last decision settles the question of ownership of this rolling stock down to and after the confirmation of sale, May 7, 1863.

See opinion, 1 *Wallace*, 640, 641.

Now Mr. Cary to avoid the effect of this decision contends that on the filing of their petition for possession, May 5, 1663, and our exceptions thereto, an issue was made up between us, as to the ownership of this rolling stock, worth more than half a million dollars ; *and that the District Court decided that issue against us, and adjudged this property to belong to them, by the order of June* 12, 1863, in this Western Division case ; and this is the only pretence left to him after the decision of this Court cited last above.

To this, there are two decisive answers :

(1.) No such issue was made or decided ; but

(2.) Conceding it to be so for the present, it is perfectly clear that the *District Court had no jurisdiction of the case for any such purpose.* If any such issue could have been made in the cause after the confirmation of the sale, by a supplemental bill or otherwise, for the purpose of determining between these parties the title to half a million dollars worth of property, *it is certain that the case must have gone to the Circuit Court for its determination.*

Therefore, if Mr. Cary could establish, in face of the facts, that such an issue was made up, and that the District Court intended to and did adjudicate the question, by their order of 12th of June, in Western Division cause, he must fail in deriving any title from that order ; because the Court had no jurisdiction, could have none, of the case, after July 15, 1862, *for any other purpose than mere execution of decrees before then made* ; and this order, in that view of it, is merely *coram non judice.* If this order of June 12, be anything more than the mere execution of the former decree, *it is void ;* and this Court has decided *that that decree*, the sale and confirmation under it, gave them no title. In other words, put the two decisions (1 Wallace 405) and (2 Wallace 641) together, this Court has decided,

1. That the District Court had no jurisdiction to adjudicate this rolling stock question against us after July 15, 1862 ; and

2. That it had not made any such adjudication, down to May 5, 1863.

If the decisions of this Court can ever silence this contumacious company, this question is at rest.

VIII.

The St. Paul Company also pretends that since the adjudication of this Court against its pretensions of ownership to this rolling stock, a new mortgage (which we have elsewhere, and in the proper place shown to have been a most glaring fraud) has been discovered; which has never yet been foreclosed, and which they claim mortgaged all the rolling stock to Bronson, Soutter and Knapp.

The answers to this are so numerous that it is difficult to select. A few may be enumerated.

(1.) The mortgage is a mere chattel mortgage, and never was filed according to the Statute; and for that reason, is by the Statute declared void as against creditors and *purchasers*. The Minnesota Company is a purchaser, at the foreclosure sale, under a subsequent mortgage. This chattel mortgage is therefore wholly void as to said Company.

R. S. Wis. 1858, (re-enactment) Ch. 45, Sec. 3.

Cotton vs. Marsh, 3 Wis. 221.

(2.) The mortgage was never renewed by affidavit, as required by Statute, and expired in one year from its date, *R. S. Chap. 45, Sec. 5.*

(3.) The mortgage itself provides that the property therein conveyed should be held by Bronson, Soutter and Knapp under their principal mortgage, and that they should sell and dispose of "the same in the "same manner, at the same time, and upon the same conditions," as the other property mortgaged, *and not* otherwise.

The Trustees sold the other property under the decree obtained upon that mortgage in 1863; and now to authorize them to foreclose this mortgage by subsequent and independent proceedings, *would be to override the express provisions of the mortgage itself;* and give the Trustees a power under the mortgage, that the mortgage *expressly* denies.

4. But waiving all these objections, conceding the validity of the mortgage, and the right of the Trustees to foreclose it; how can the St. Paul Company claim any benefit from it? That Company is not the mortgagee, is not an assignee of the mortgage, has no rights and pretends none, except as holder of bonds secured by the mortgage. The Minnesota Company — the owner of the equity of redemption, — cannot be deprived of its rights until it is foreclosed; and on the fore-

closure of the mortgage, if it shall ever be foreclosed, the property must be sold at public auction, and we are as likely to become the purchaser as they are. One of two things is certain; this mortgage either has or has not been foreclosed.

1. If it has been, then it is merged in the Western Division foreclosure decree; and this court has already decided that the St. Paul Company acquired no title to this property by virtue of their purchase under that decree.

2. If it has not been foreclosed, then the St. Paul Company, which is a purchaser of only what that decree ordered to be sold, can claim no benefit under this mortgage which was not foreclosed by that decree.

The idea that a purchaser at a sale, on the foreclosure of one mortgage, becomes thereby entitled to claim other property included in another mortgage which has not been foreclosed, rests upon no authority that I know of except the text, "For whosoever hath, to him shall be given, and he shall have more abundance; but whosoever hath not, from him shall be taken away even that he hath." This eccentric disposition of spiritual gifts, that has troubled commentators not a little, has never been adopted into positive jurisprudence, or applied to rolling stock on a railroad.

IX.

The remaining excuses given by the St. Paul Company for disobeying the order and decree of the Court below, amount to no more than this: that they who have no title, need this property more than we do, who have the title, and to whom that Company has been ordered to deliver it.

This apology was an additional contempt of the Circuit Court.

What would this court say to a Bill filed by the St. Paul Company against the Prairie du Chien Railroad Company, asking the court to order the latter company to furnish for the use of the former, certain of the latter Company's rolling stock, upon the mere ground that the defendant owned more rolling stock than it needed, and that the complainant did not own half as much as it needed? If this ground be an excuse for disobedience, it would be good ground of affirmative relief in the case supposed.

MATT H. CARPENTER,
Counsel for the Petitioner.

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OPINION

OF

A. G. MILLER,

DISTRICT JUDGE,

ON THE MOTION FOR ATTACHMENT,

IN THE CASE OF

JAMES T. SOUTTER,

VS.

THE LA CROSSE & MILWAUKEE RAILROAD.

OPINION

OF

A. G. MILLER, DISTRICT JUDGE,

ON MOTION FOR ATTACHMENT IN THE CASE OF

James T. Soutter,

vs.

The La Crosse & Milwaukee railroad company, and others.

MILLER, DISTRICT JUDGE.

This is a motion for an attachment against H. Crocker, Receiver, and the officers and directors of the Milwaukee and St. Paul Railway Company, as for contempt in not obeying an order of Court to deliver rolling stock to the Milwaukee and Minnesota Railroad Company.

It appearing to the Court, that the Receiver has complied with the order as far as was in his power, the application as to him will be dismissed.

It is also made to appear, that the St. Paul Company have delivered rolling stock, which, with the stock delivered by the Receiver, is sufficient to enable the Milwaukee and Minnesota Company to operate the road in their possession from Milwaukee to Portage City. This application relates to the large surplus retained by the St. Paul Company for operating their through route from Milwaukee, by way of Watertown, to La Crosse.

When the suits were brought to foreclose the mortgages of the La Crosse Railroad Company on their road from

Milwaukee to La Crosse, the road was not in such a state of completion as to admit of safe travel or traffic. It was unfinished, and the company was hopelessly insolvent; and the directors either neglected or were unable to pay the interest accruing on the mortgage debts, or to put the road in a condition for public use. Under such circumstances the appointment of a Receiver was an absolute necessity. The public has a paramount right to the use of a railroad according to the terms of the charter. The Company, by its charter, is made a common carrier, bound to transport persons and property offering at its depots The parties litigant are not the only interested parties in a suit involving the use of rolling stock on a railroad. The commerce and business of the people must be protected according to the intent and object of the legislative grant, while litigation is progressing between parties, respecting the rolling stock or the debts of the Company. Upon this principle large sums of money were disbursed, from time to time, by the Receiver, under orders of the Court, in completing the road, replenishing rolling stock, and preserving the road and stock in an operating condition.

The Minnesota Company claiming to be the owner of the Eastern Division, as purchaser under the mortgage of the La Crosse Company to Barnes, applied to this Court for an order to be put in possession of that Division and of all the rolling stock that came to the hands of the Receiver at his appointment. I refused that order, in advance of the payment of the interest accrued on the mortgage in this suit, as the road was not in my opinion an adequate security for the debts, and that there were other claims prior to the mortgage to Barnes, and that the claim of the St. Paul Company to the stock was in litigation, and that the public rights might be thereby unnecessarily prejudiced. Although this matter was not strictly appealable according to

the practice of the U. S. Courts, yet it appeared in the Supreme Court existing in the record sent up in this case upon other appeals. A mandate came from that Court, that an order should be entered of record in this Court, that upon the payment of the interest in the decree in this case, the Minnesota Company be put in possession of the Eastern Division of the road and of the whole rolling stock that came to the hands of the Receiver at his appointment, and also a certain portion of that supplied by him. I permitted the order to be made by the Circuit Court, the same as if I were not present, not being disposed to resist the mandate. But if I had been sitting alone, I should have made the order with the modification hereinafter proposed. At the same time, a bill of the Minnesota Company against the St. Paul Company was pending in this Court for the stock that came to the Receiver's hands at his appointment, and the St. Paul Company were defending it on the ground that they were purchasers of that stock under the decree in the Land Grant Mortgage, and that the Minnesota Company was not entitled to the exclusive possession of it. That bill, demurred to by the St. Paul Company, was here dismissed. On appeal to the Supreme Court, the demurrer was overruled, and the cause was returned to this Court for further proceedings. Four judges agreed in opinion that the bill was a good bill, upon the fact as alleged, that the Minnesota Company was the owner of the stock, and three of the judges dissented on the ground that that Company was not entitled to its exclusive possession. Since then the St. Paul Company have answered; and on pleadings and proof the bill has this day been dismissed on its merits. And at the term in September last an order was made by the Circuit Judge overruling exceptions to the report of Mr. Palmer as special master, charging the St. Paul Company for the use of that stock, which order is now pending

in the Supreme Court on appeal. It is claimed on behalf of the Minnesota Company that this order, and the decision of the Supreme Court overruling the demurrer to the bill of the Minnesota Company, fixed the rights of those parties to that stock. I will not say more on this subject than that it has never before received the sanction of a court of justice, that an order pending on appeal and a decision of a Court overruling a demurrer with an order for further pleadings and proceedings, settled the rights of parties as to the matter in litigation. And in addition to this, Chamberlain's lease, assigned to the St. Paul Company, and prior in date to the Barnes' Mortgage, under which the Minnesota Company was organized, remains undisturbed as to this Company as a subsequent purchaser with actual or legal notice of such lease. And the St. Paul Company claims to be in possession of the stock as the assignee in equity of a separate and distinct mortgage of the La Crosse Company of all their rolling stock prior in date to the Barnes Mortgage. In the face of all this we are asked to carry out literally the mandate of the Supreme Court, made when not in full possession of the merits of this controversy. We are asked to enforce an execution, in the nature of an attachment of these persons as for contempt, in advance of final hearing and decree of the cause or matter in issue upon the pleadings and proofs. To grant the attachment prayed for under the circumstances is not administering justice according to principles well established for centuries. Summary arrests and proceedings, inconsistent with established rights and precedents under our constitution and laws, are not to be favored by well-regulated judicial tribunals. I entertain the highest respect for the Supreme Court of the United States, and with deference submit to the ultimate opinion of that Court whether I shall deserve their censure, for not literally carrying out the order for

possession of the rolling stock, under the present circumstances.

It is alleged that refusal of the attachment, as asked for, is doing injustice to those persons who advanced the interest money on the decree. They paid the money with legal, if not actual, notice of the pending and existence of the suits, records and proceedings above enumerated. They must have known of this tedious and complicated litigation, and should have examined the records before contributing the money. I am not disposed to do them injustice. I have waived the appointment of a Receiver a short time ago, as prayed for, to take possession and management of the rolling stock. I am disposed to overlook the exception to this application, that all the sureties to bonds required by the order to be given by the Minnesota Company reside out of the State, and are of doubtful ability to pay the penalty of said bonds. Some of the sureties to a bond of this kind should reside in the district according to all practice, as it is not fair to require suitors of this Court to travel into other States or districts to enforce such securities. I am disposed, also, to overlook the objection, also well taken, that a short rule directing the manner or method of carrying out the order, and fixing on a day for complying with it, is required by strict chancery practice, to bring the party into contempt, has not been taken. Strict practice is required to found an application for attachment. And I am willing to overlook the want of legal precision in the order.

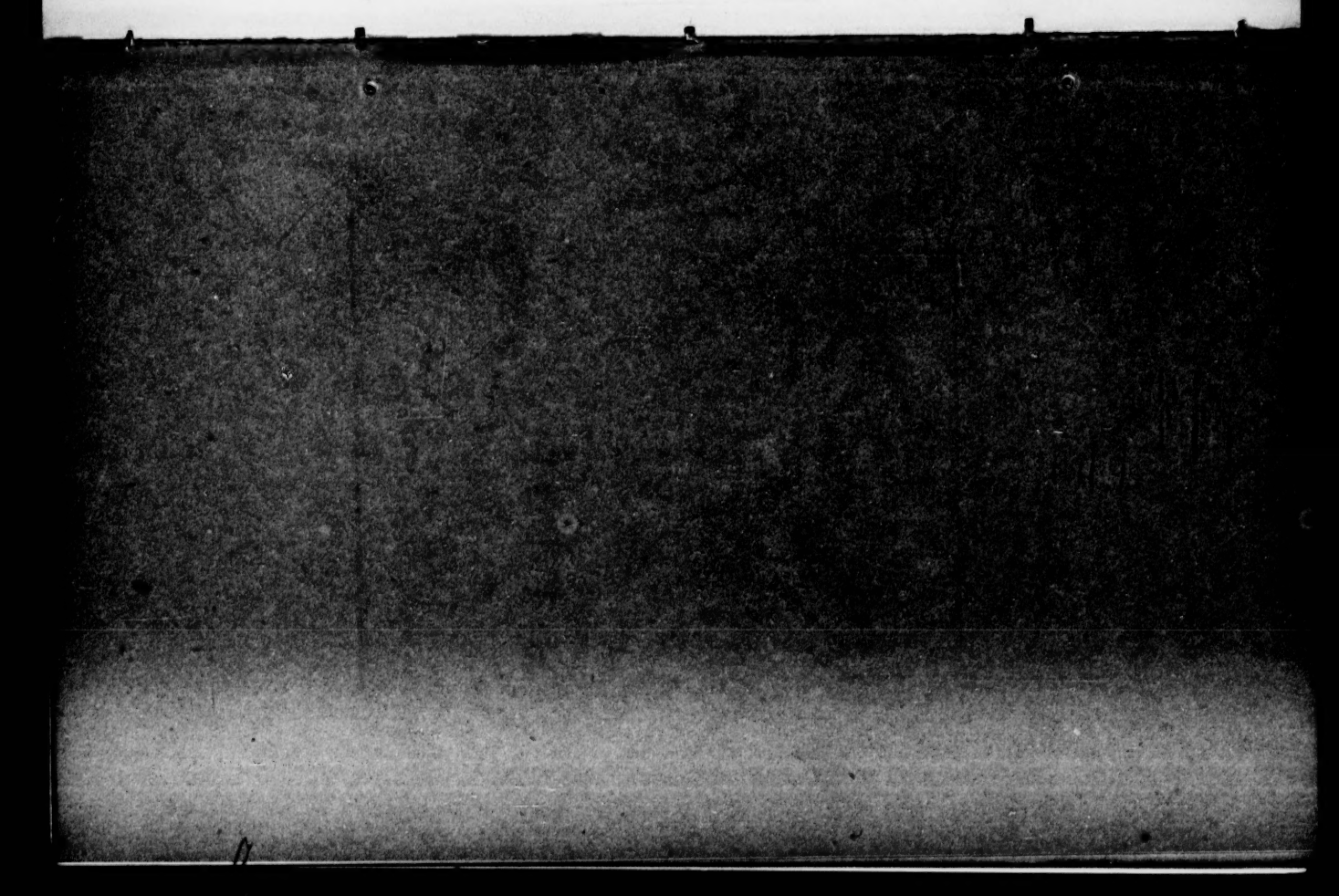
It appears that there is over and above what is necessary for operating the road between Milwaukee and Portage City a large surplus of rolling stock in possession of the St. Paul Company and necessarily used in operating their line between Milwaukee and La Crosse, through Watertown. The suit pending between the parties for the rolling stock, is similar to a suit in admiralty in regard to the own-

ership or possession of a vessel. A vessel and rolling stock of a railroad are the instruments used by common carriers, by water in the one case and by land in the other. The vessel, during the pendency of the suit, is not permitted by the Court to lie idle and rot at the dock, but is delivered to one of the litigant parties on bond; nor should the great surplus of rolling stock stand idle and decay on the switches and by the road side between Milwaukee and Portage City; nor will it be just to the lawful demands of the public to interrupt the trade and commerce of this city and State by abruptly and unnecessarily withdrawing the surplus rolling stock from the road between Milwaukee and La Crosse.

For these reasons, and with a desire to obey the mandate of the Supreme Court, in justice to all parties interested and to the public, and substantially to carry out the order, I propose that a competent person or persons be appointed, whose duty it shall be to ascertain the quantity of stock necessary for operating the road between Milwaukee and Portage City, and to make report to this Court. And on such report the St. Paul Company shall deliver such additional stock as may be required, if any, and also give a bond in a given penalty, say two hundred thousand dollars, with sureties approved by a Judge of this Court, conditioned that they will make proper use of the stock remaining in their hands and that they will account for and pay the net use of such stock to such corporation or persons as may be found entitled to such. That an attachment be now granted, but not to be issued nor served, if these conditions are complied with within a certain day.

This proposition, if carried out, would be a substantial compliance with the order and mandate, and might avoid trouble and possible suits growing out of a literal allowance and execution of the attachment asked for.

The Directors of the St. Paul Company expressed in Court a willingness to accept this proposition. The attorney of the Minnesota Company objected to it; when the the attachment as prayed for was denied.



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Supreme Court of the United States.

DECEMBER TERM, 1866.

IN THE MATTER OF THE PETITION

OF

THE MILWAUKEE AND MINNESOTA RAILROAD CO.

FOR MANDAMUS, &c.

BRIEF FOR THE MILWAUKEE AND ST. PAUL'S RAILWAY COMPANY AND ITS OFFICERS, RESPONDENTS.

JOHN W. CARY,
E. G. RYAN,
Of Counsel for Respondents.

McGill & Witherow, Printers & Stereotypers, Washington, D.C.

Supreme Court of the United States.

DECEMBER TERM, 1866.

PETITION OF MILWAUKEE AND MINNESOTA RAILROAD COMPANY FOR MANDAMUS, &c.

BRIEF FOR THE MILWAUKEE AND ST. PAUL RAILROAD COMPANY AND ITS OFFICERS, RESPONDENTS.

The petition has four several prayers in the alternative. They may perhaps be safely resolved into two.

The petition prays for a *mandamus* to the circuit court, commanding that court to attach the respondents for contempt of that court; and failing that remedy—

The petition prays this Court to attach the respondents for contempt of the circuit court; for it is idle to pretend that the alleged contempt was of this Court.

This court made no order against the respondents in the premises. The *mandate* of this Court directed the circuit court to make an order that, upon contingencies and conditions specified, the receiver should deliver the road, "with all the appurtenances, rolling stock, and other property" belonging to the road, to the petitioner. The *mandate* had no relation to the respondents—did not assume to determine what rolling stock belonged to the road to be delivered, but left that question to be settled by the circuit court. The *mandate* merely dictated a principle of decision to the circuit court, on which it became the duty of the circuit court to act.

The circuit court did act in obedience to the *mandate*, and until it had so acted, no right accrued to the petitioner which could be enforced against the receiver or any party in the cause.

The circuit court made an order under the *mandate*,

broader than the *mandate*, of which the respondents complain, not the petitioner. The *mandate* was performed to the satisfaction of the petitioner. And what is here complained of is, not that the order directed by the *mandate* was not made, but that, being made, it was not satisfactorily executed; not that the *mandate* was not obeyed, but that the order was not.

And in the circuit court the petitioner very properly regarded the alleged contempt as a contempt of the circuit court, and not of this Court. (See petition, p. 30.)

So the petition in the first prayer deals with it as contempt of the circuit court. For anomalous as the petition is, it would be even more so, if construed by the petitioner to pray this Court, to order the circuit court to attach the respondents, for a contempt of this Court.

It is not considered that the title of the parties to the rolling stock in dispute is or can be a question to be passed upon on this petition.

It is submitted that the title of property cannot be incidentally determined. Where title is questioned, it can be settled only in some suit at law or in equity, brought to settle it, by one of the claimants of title against the others. It is submitted that it cannot be settled on demurrer to a bill in chancery, where leave is given to answer over; nor upon an accounting; nor upon any interlocutory order, especially where one of the claimants is not a party to the cause.

The petitioner well understood this when it filed its bill (2 Wallace, 609) setting up its title against the principal respondent and others. To that bill answers were put in and a cross bill filed, putting in issue the petitioner's title, and setting up title in the defendants. That bill has been heard—a decree passed dismissing it, upon a division of the judges of the circuit court. And the whole record of that supplemental suit is here at this term, upon appeals of several of the parties.

And the judgment of this Court on those appeals cannot be forestalled by this petition; nor the direct issue of title in that cause be controlled by any incidental, collateral proceeding.

The question of title, therefore, will not be discussed, in opposing the prayer of the petition.

I.

The power to punish for contempt, as a power of self protection, is one inherent in all courts of record. It is a discretionary power always, specially declared so in the act of Congress (24th September, 1789, sec. 17) conferring it on the Federal courts, and is essentially an exercise of judicial function, within the sound discretion of the offended court.

It was the peculiar jurisdiction of the circuit court to determine whether there had been a disobedience of its orders; and, if a disobedience, whether it called for the punitory process of that court.

And the determination of the circuit court on the petition of the present petitioners, was an exercise of judicial power and discretion, conclusive unless it be reversible, and reversed by a direct proceeding to reverse it, in an appellate court. See, on this point, the authorities cited *infra* on point II.

It has been long and well settled by this Court that it will not interfere by *mandamus* with the exercise of judicial power in the circuit or district courts, except to enforce its own mandates.

"We are clearly and unanimously of opinion, that a *mandamus* ought not to issue. It is evident that the district judge was acting in a judicial capacity, when he determined that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain Barre; and (whatever might be the difference of sentiment entertained by this court) *we have no power to compel a judge to decide according to the dictates of any judgment but his own.*" (U. S. *vs.* Lawrence, 3 Dallas, 42, 53.)

"On a *mandamus*, a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but they will, in a proper case, require the inferior court to decide." (Insurance Co., *vs.* Wilson's heirs, 8 Peters, 291, 304.)

"We are of opinion that this is, in no just sense, a case for a writ of *mandamus*. This Court has authority given to it,

by the 13th section of the Judiciary Act of 1789, c. 20, to issue writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States. *The present application is not warranted by any such principles and usages of law. It is neither more nor less than an application for an order to reverse the solemn judgment of the district judge, and to substitute another judgment in its stead.* Now a writ of *mandamus* is not a proper process to correct an erroneous judgment or decree rendered in an inferior court. That is properly matter which is examinable upon a writ of error or an appeal (as the case may require) to the proper appellate tribunal." (*Exparte* Hoyt, 13 Peters, 279, 290.)

"Certainly, even in England, the King's Bench never claimed or exercised the power to issue a *mandamus* to an inferior court of record, commanding it to reverse its judgment, in a matter where the law authorizes it to judge. In the case before us, the power of deciding on the sufficiency of the affidavit, and the amount of bail, is a part of the judicial power of the court. It has exercised this power, and passed its judgment. We do not mean to say that this judgment is in any respect erroneous. But assuming it to be so, this Court cannot, by *mandamus*, command them to reverse it. The writ has never been extended so far, *nor ever used to control the discretion and judgment* of an inferior court of record acting within the scope of its judicial authority." (*Exparte* Taylor, 14 Howard, 3, 12.)

A motion to amend, after writ of error decided in this Court, was made and refused by the circuit court. "The court refused to allow the amendment to be made, and overruled the motion. And we think its judgment, whether it be correct or not, cannot be revised in the form of proceeding moved for on behalf of the plaintiff. The decision of the circuit court was not a mere ministerial act. It was the decision of a court of competent jurisdiction, made in the exercise of judicial authority and discretion. This Court might unquestionably issue a *mandamus* to the court below to proceed to judgment. But in this case the court has proceeded to judgment, upon the question submitted to its decision; and whether that judgment be erroneous or not, this Court has not jurisdiction to re-examine it in a proceeding by *mandamus*. The motion for a rule to show cause must, therefore, be overruled *for want of jurisdiction*." (*Exparte* Many, 14 Howard, 24.)

"On a *mandamus*, a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but they will, in a proper case, require the infe-

rior court to decide. It has repeatedly been declared by this Court that it will not, by *mandamus*, direct a judge as to the exercise of his discretion; but it will require him to act." (United States *vs.* Addison, 22 Howard, 174, 183.)

To similar effect are *Exparte* Davenport, 6 Peters, 661,3; *Exparte* Roberts, 6 Peters, 216; Bradstreet *vs.* Huntington, 8 Peters, 588; Insurance Co. *vs.* Adams, 9 Peters, 573, 602, 604; *Exparte* Whitney, 13 Peters, 404; Decatur *vs.* Paulding, 14 Peters, 497; *Exparte* Sercomb, 19 Howard 9. See also Tapping on Mandamus, 12, 13.

The district and circuit courts of the United States are not inferior courts, though subject to a well defined and clearly limited appellate jurisdiction of this Court. And to take from them, by the exercise of indirect appellate jurisdiction, their power of self-protection, and their exclusive jurisdiction over contempt of their authority, would not only be subversive of judicial order, but would leave those courts without dignity or proper power in the exercise of their great jurisdiction. It would degrade this Court, by degrading the tribunals over which this Court exercises a proper, by assuming an improper, appellate jurisdiction.

Process of attachment and sequestration for contempt is a *quasi* criminal proceeding. The petitioner attempted that process in the circuit court; the circuit court gave judgment against the process. And it is submitted that this judgment, unreversed, is conclusive, and a bar to all other proceedings for the same process for the same cause.

The judges of the circuit court disagreed. Would this Court have entertained a certificate of division of opinion? If this Court would, that and not this, was the proper remedy of the petitioner. If this Court would not have done so, as it is sub-

mitted it ought not to have done, then is not that conclusive that this Court will not do indirectly what it could not do directly? For the *mandamus* sought, if granted, must go upon the ground that one of the judges erred in the disagreement, and that the opinion of the other ought to prevail.

It is claimed for the petition that the petitioner has no other remedy. That was true in *Exparte* Many; and yet the writ was refused. *Mandamus* will not go on that ground alone. There must be a clear ground of jurisdiction, as well as no other remedy. (Tapping, 11.)

But it is submitted that the petitioner has ample remedy. It has filed its bill, setting up and seeking to enforce its title. If a bill in equity should be held not a proper remedy, it has an action at law. If its title be good, there is no failure of remedy, where remedy is properly sought by direct process, not by incidental, interlocutory proceeding.

It is submitted that this Court has not jurisdiction to issue the *mandamus* prayed for; and that, conceding jurisdiction, it ought not to issue.

II.

It has been held that the Federal courts possess the power to punish for contempt, independent of statute. But the statute is the most authoritive definition of this power.

"All the said courts of the United States shall have power * * * to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority, in any cause or hearing before the same." (Act of 24th September, 1789, section 17.)

The power here given or defined is very clearly the same, as at common law, of each court to punish for contempts of its own authority—contempts *before the same*.

And it is submitted that such is the uniform rule of decision in the Federal courts.

"Every court is the sole judge of its own contempts; and in case of commitment for contempt," and *a fortiori* in case of refusal to adjudge in contempt, "no other court can have a right to inquire into the correctness or propriety of the commitment" or refusal to adjudge in contempt.

The petitioner, *Exparte* Kearney, was committed for contempt of the circuit court for the District of Columbia. He applied to this Court for a *habeas corpus*. Refusing the writ, the Court says, after explaining that it possessed no appellate jurisdiction in criminal cases:

"If, then, this Court cannot *directly* revise a judgment of the circuit court in a criminal case, what reason is there to suppose that it was intended to vest it with authority to do it indirectly?

"It is also to be observed that there is no question here, but that this commitment was made by a court of competent jurisdiction, and in the exercise of an unquestionable authority. The only objection is, not that the court acted beyond its jurisdiction, but that it erred in its judgment of the law applicable to the case. If, then, we are to give any relief in this case, it is by a revision of the opinion of the court, given in the course of a criminal trial, and thus asserting a right to control its proceedings and take from them the conclusive effect which the law intended to give them. If this were an application for a *habeas corpus*, after judgment on an indictment for an offense within the jurisdiction of the circuit court, it would hardly be maintained that this Court could review such a judgment, or the proceedings which led to it, or set it aside and discharge the prisoner. *There is, in principle, no distinction between that case and the present:* for when a court commits a party for a contempt, *their adjudication is a conviction*, and their commitment, in consequence, is execution."

After quoting, with approval, English authorities to the effect that "the sole *adjudication of contempt*, and the punishment thereof, *belongs exclusively*, and without interfering, to *each respective* court," the opinion proceeds:

"So that it is most manifest from the whole reasoning of the court in this case, that a writ of *habeas corpus* was not

deemed a proper remedy where a party was committed for a contempt by a court of competent jurisdiction, and that if granted *the court could not inquire into the cause of commitment.* If, therefore, we were to grant the writ in this case, it would be applying it in a manner not justified by principle or usage, and we should be bound to remand the party, unless we were prepared to abandon the whole doctrine, so reasonable, just, and convenient, which has hitherto regulated this important subject. We are entirely satisfied to administer the law as we find it, and are all of the opinion that upon the facts of this case the motion ought to be denied.

"The argument of inconvenience has been pressed upon us with great earnestness. But when the law is clear this argument can be of no avail; and it will probably be found that there are also serious inconveniences on the other side. Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse it will be a public grievance for which a remedy may be applied by the Legislature, and is not to be devised by courts of justice." (*Exparte* Kearney, 7 Wheaton, 38, 42.)

The adjudication, thus conclusive on conviction, is equally conclusive on acquittal.

Exparte Kearney is cited and approved, (*Exparte* Watkins, 3 Peters, 193, 208.)

Still more direct to the present case is the language of C. J. Marshall, (*Exparte* Tillinghast, 4 Peters, 108.) Speaking of Mr. Tillinghast's application for admission to this bar, the Chief Justice said:

"The circumstance of his having been stricken off the roll of the counsellors of the district court of the northern district of New York, by order of the judge of that court, for a contempt, is one which the Court do not mean to say was not done for sufficient cause, or that it is not one of a serious character; but *this Court does not consider itself authorized to punish here for contempts which may be committed in that court.* When, on a former occasion, a *mandamus* was applied for to restore Mr. Tillinghast to the roll of counsellors of the district court, this Court refused interference in the matter, *not considering the same within their cognizance.*"

A very elaborate review of the cases on this subject may be found in *Exparte* Nugent, in the circuit court of this district, (1 Am. L. J., 107,) C. J. Cranch delivering the unanimous opinion of that court to the same effect.

It is submitted that this Court has no jurisdiction, directly or indirectly, to punish for a contempt of the circuit court, or to revise the adjudication of that court that a contempt has not been committed; and that the assumption of such a jurisdiction by this Court would be subversive of all judicial order.

III.

But it is submitted that, if the court should consider the question on this petition, no contempt was in fact committed by the respondents.

A.

The contempt imputed is disobedience of the order of the circuit court made July 18, 1865.

This order directs that upon payment, before sale, of the arrears of the mortgage debt, and upon the giving of certain bonds, the respondents should deliver the road and rolling stock to the petitioner.

Such a delivery essentially requires preparation and time. No time is specified by the order, within or by which the delivery is to be made.

Rule 8 of the circuit court contains this provision:

"If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land, or the delivery up of deeds or other documents, the decree *shall*, in all cases, *prescribe the time within which the act shall be done*, of which the defendant shall be bound without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with *within the prescribed time*, the clerk shall issue a writ of attachment," &c.

This is analogous to the English practice, to which this Court refers for guidance, where the rules here are silent.

Formerly, in the English Chancery, when a decree or order directed any act to be done, except only the payment of money, it was necessary to get what was called a short order, specifying a time by which the act must be done, before application for attachment would lie. By a later rule, every decree or order requiring any act to be done, must limit the time by which it is to be done, on penalty of attachment. (2 Daniel's Ch. Pr., 2d Am. edition, 1,249; 3 Am. edition, 1,058.)

No time was here limited for the doing of a work of time, labor, and difficulty; and it was necessary for the petitioners to have obtained a short order, limiting the time, before he could proceed as for contempt.

B.

The order was contingent upon performance of conditions precedent. The performance of these conditions should have been judicially ascertained and declared, before compliance with the order could be called for or enforced.

The circuit court had not been moved to declare, and had not declared, such compliance. It was, indeed, one of the points on which the judges differed, whether or not the conditions precedent had been fully complied with.

It was not for the respondents to determine judicially, for themselves, whether there had been a compliance, by the petitioner, with an order in a cause in which they were not parties. No man can be his own chancellor.

Indeed, the receiver would have been guilty of contempt in deciding that question for himself, and acting on his own decision.

The whole practice was irregular, in not obtaining an order declaring the compliance of the petitioner, and limiting the time within which the respondents should be reasonably required to accomplish the complicated delivery.

C.

There was not, in fact, a performance of the condition precedent by the petitioner.

The money was paid, in fact, though even that is not yet judicially declared. But the bonds were not given, as required.

The bonds pretended to be given were by non-residents. Judicial security should, like special bail, be of residents.

The approval of the clerk went for nothing. The clerk is not a judicial officer, and the approval was a judicial act. The order could not confer this power on the clerk; and its doing so taints the whole procedure with irregularity.

It is not to be forgotten that the proceeding was in the nature of a criminal process. It was for the petitioner to make out its case, strictly and rigidly, according to law and the practice of the court. It has signally failed to do so. And until it shall do so, whatever the court may think or feel in the premises, it cannot convict the respondents on a case, lame, defective and incomplete *in allegatis et probatis*.

No contempt is properly established; and conceding the jurisdiction of this Court to grant either prayer of the petitioner, the petition must be dismissed on the merits.

JOHN W. CARY,
E. G. RYAN.

WASHINGTON, Dec. 10, 1866.